APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

ULISES LEDO,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0602-PC-49
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Robert J. Schmoll, Judge
Cause No. 02D04-9703-CF-139

May 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Ulises Ledo, pro se, appeals from the denial of his petition for post-conviction relief.

We affirm.

ISSUES

1. Whether Ledo received ineffective assistance of trial counsel.

2. Whether the trial court judge erred by failing to recuse herself.

3. Whether Ledo is entitled to a new trial based upon newly discovered evidence.

4. Whether the habitual offender determination should be vacated.

FACTS

We adopt the statement of facts set forth in the Indiana Supreme Court's decision in *Ledo v. State*, 741 N.E.2d 1235 (Ind. 2001), which reads as follows:

> The facts most favorable to the verdict indicate that on February 24, 1997, [Ledo] went to Bryan Fitzhugh's apartment where the two drank and smoked marijuana. Josh Warner arrived and told them that he had just returned from Mr. Osterholt's mobile home where there were guns, a VCR, a Nintendo, and possibly money. After smoking crack cocaine, [Ledo] and Fitzhugh went with Warner and another friend [Todd Clevenger] to the mobile home. [Ledo], followed by Fitzhugh, entered the mobile home, hit Mr. Osterholt, tied his hands, and pushed him onto the bed. [Ledo] then ordered Fitzhugh to kill Osterholt, whereupon Fitzhugh shot Osterholt with a shotgun, killing him. [Ledo] and Fitzhugh left the mobile home carrying guns and other items that they had taken from inside. The four then returned to Fitzhugh's residence. About one or two hours later, [Ledo] and Fitzhugh began discussing their concerns about fingerprints at the victim's mobile home. Finally, [Ledo] and Warner, accompanied by two different individuals, returned to the mobile home. On this second trip, [Ledo] and his new group of companions took more of the victim's belongings.

> The State charged [Ledo] with Felony Murder, Robbery, two counts of Burglary, Criminal Confinement, and with being a habitual offender.

741 N.E.2d at 1237 (footnotes omitted). During the trial,

> The State presented evidence that [Ledo] and Fitzhugh broke into and entered the victim's mobile home and took items from it, and Fitzhugh testified that [Ledo] tied the victim's hands behind his back, pushed him onto the bed, and ordered Fitzhugh to kill the victim.

Id. at 1238. The jury found Ledo guilty on all counts and found him to be an habitual offender. The trial court sentenced Ledo to a total of 105 years of incarceration.

Ledo appealed, asserting that the evidence was insufficient to sustain his conviction for felony murder and one of the burglary counts, and that his convictions on two counts of burglary violated Indiana's Double Jeopardy Clause. The Indiana Supreme Court affirmed the trial court on February 7, 2001.

On February 4, 2002, Ledo, by counsel, filed a petition for post-conviction relief. Ledo filed an amended petition for post-conviction relief on May 2, 2003, alleging that the trial judge should have recused herself and that "[t]he determination that petitioner was an habitual offender should be reversed because petitioner had had one count of one of the underlying charges used to support the habitual vacated." (App. 149).

The post-conviction court held an evidentiary hearing on January 16, 2004. On May 6, 2004, Ledo filed a motion to reopen or amend his petition for post-conviction relief. The post-conviction court held a second evidentiary hearing on July 14, 2005. On December 13, 2005, the post-conviction court denied the petition and entered its findings of fact and conclusions of law. Additional facts will follow.

DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Thompson v. State*, 796 N.E.2d 834, 838 (Ind. Ct. App. 2003), *trans. denied*; Ind. Post-Conviction Rule 1(5). When reviewing the denial of a petition for post-conviction relief, we will neither reweigh the evidence nor judge the credibility of the witnesses. *Id*. Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id*. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion. *Id*.

1. Ineffective Assistance of Trial Counsel

Ledo contends that his trial counsel was ineffective. Specifically, Ledo argues his counsel failed to do the following: (a) object to testimony regarding Ledo's other crimes, wrongs, or acts; (b) object to the admission of a photograph of Osterholt and his son; (c) object to testimony regarding witnesses' truthfulness; (d) object to purported hearsay testimony; (e) advise Ledo regarding the trial court judge's potential conflict; and (f) pursue DNA evidence.

We evaluate claims concerning denial of the Sixth Amendment right to effective assistance of counsel using the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*; *Cooper v. State*, 687 N.E.2d 350, 353 (Ind. 1997). A defendant must show that his counsel's performance fell below an objective standard of

reasonableness, and that the deficiencies in the counsel's performance were prejudicial to the defense. *Id*. As to counsel's performance, we presume that counsel provided adequate representation. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference." *Id*. Furthermore, a petitioner must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003). As to prejudice, "there must be a showing of a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "It is not necessary to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.*

When a petitioner brings an ineffective assistance of counsel claim based upon trial counsel's failure to make an objection, the petitioner must demonstrate that the trial court would have sustained a proper objection. *Id.* at 1164. "To succeed on a claim that counsel was ineffective for failure to make an objection, the defendant must demonstrate that if such objection had been made, the court would have had no choice but to sustain it." *Sanchez v. State*, 675 N.E.2d 306, 310 (Ind. 1996). Additionally, the petitioner must demonstrate that failure to object prejudiced the petitioner. *Law*, 797 N.E.2d at 1162.

a. *Testimony regarding prior bad acts*

Ledo contends his counsel was ineffective at trial for "fail[ing] to object to numerous instances of testimony presented by various State witnesses concerning Ledo's

drug use, drug dealing, shoplifting, and selling counterfeit drugs to others." Ledo's Br. 20. Specifically, Ledo asserts that his counsel should have invoked Indiana Evidence Rule 404(b), which provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identify, or absence of mistake or accident . . . .

Fitzhugh testified at trial that he and Ledo "would get high together" and had been drinking and smoking marijuana the night of the murder. (Tr. 647). Clevenger testified that he would give Ledo rides "if [Ledo] needed to get around a little bit to conduct some business," namely, "selling cocaine." (Tr. 947). Clevenger also testified that he drove Ledo to a shopping mall the day before the murder because "Ledo wanted to go in and do some shop lifting," in order to "get some money and get some dope so him [sic] and his girl could get high." (Tr. 949, 950). Clevenger further testified that on the evening of the murder, he drove Ledo to a house, where Ledo "sold . . . people some baking soda." (Tr. 965). Richard Allen testified that the day before the murder, he and Ledo went to a shopping mall, where Ledo "was going to try and find a way of getting some money to buy drugs." (Tr. 1040). Allen also testified that Ledo came to his home the morning after Osterholt's murder and left four guns with Allen. Allen further testified that Ledo gave him a ring and a watch, which Ledo asked Allen to pawn in order to get money to buy drugs.

During the post-conviction hearing, Ledo's trial counsel testified that he did not object to Fitzhugh's testimony regarding drug use "because that would go towards his

credibility that being Fitzhugh's credibility and his recollection—his ability to recall the events that evening if he's high." (App. 273). Ledo's trial counsel also testified that he could not recall why he did not object to the testimony about Ledo's shoplifting but believed that he did not "want to bring any more attention to it . . . ." (App. 280). Ledo's trial counsel agreed that he should have objected to testimony regarding Ledo dealing drugs and selling counterfeit drugs.

Regarding Ledo's drug use, the post-conviction court found that the State introduced evidence of Ledo's drug use "in order to establish a motive for committing the crimes charged" and that evidence of such acts is admissible to show motive pursuant to Evidence Rule 404(b). (App. 235). The post-conviction court concluded that "[i]t is clear from the trial testimony that the reason for the Defendant's actions were to obtain drugs or money to buy drugs." (App. 235). We agree. Given that the testimony did not violate Evidence Rule 404(b), Ledo has failed to meet his burden of establishing that had an objection been made, the trial court would have sustained the objection.

As to the testimony regarding Ledo's drug dealing, selling fake drugs and shoplifting, the post-conviction court determined that such testimony "should have been excluded pursuant to [Evidence Rule] 404[(b)]," and that "[i]f an objection had been made, the trial court would have sustained the objection; however, the prejudice to the Petitioner was minimal in that his commission of petty crimes in no way showed a propensity to commit the crimes of murder, burglary and criminal confinement." (App. 235). Thus, the post-conviction court concluded, "[i]n view of the totality of the

evidence presented at the trial, the impact of counsel's errors was minimal . . . ." (App. 235).

Although we agree that the trial court most likely would have sustained an objection to the testimony regarding Ledo's prior bad acts, we cannot say that Ledo was prejudiced to the extent that, but for his counsel's failure to object, the result of the proceeding would have been different. Contrary to Ledo's assertion that "[e]vidence of Ledo's bad acts . . . had the effect of bolstering the testifying State witnesses' credibility, which severely damaged Ledo's credibility," we find that the testimony did nothing to bolster the witnesses' credibility where they admitted to participating in the acts about which they were testifying. Ledo's Br. 22.

b. *Photograph of Osterholt*

Ledo asserts he received ineffective assistance of counsel because his counsel failed to object when "[a] photograph of Osterholt with his young son, taken while Osterholt was alive, was introduced into evidence to show that Osterholt had been a living human being before the murder." Ledo's Br. 22. Ledo argues that given case law regarding photographs admitted into evidence, trial counsel's failure to object constituted ineffective assistance of counsel.

In *Humphrey v. State*, 680 N.E.2d 836 (Ind. 1997), the trial court admitted into evidence a photograph of the victim and his young son. Reviewing the admissibility of the photograph for an abuse of discretion, Indiana's Supreme Court held that although relevant to show that the victim had been alive, "[i]n the absence of some showing of greater probative value, the better part of the trial court's discretion would have been to

exclude it." 680 N.E.2d at 842. The Indiana Supreme Court, however, found no abuse of discretion or likelihood of prejudice sufficient to warrant a new trial.

In this case, Jeff Gebert testified that he and Osterholt were neighbors in February of 1997, and he had known Osterholt for more than a year. The State presented Gebert with a photograph of Osterholt and Osterholt's son, asking Gebert whether the "photo truly and accurately reflect[ed] how . . . Osterholt and his son Jessie looked when [Osterholt] was alive[.]" (Tr. 572). Gebert replied that it did. At the State's request, the trial court admitted the photograph into evidence without objection.

In this case, the admission of the photograph was within the trial court's discretion. *See id.* at 842-43. Thus, Ledo cannot show that the trial court would have sustained an objection. *See Sanchez*, 675 N.E.2d at 310. Even if the trial court would have sustained an objection, we cannot say that failure to object prejudiced Ledo. Any influence on the jury and its verdict is speculative given the evidence in the case. *See Kelley v. State*, 470 N.E.2d 1322, 1325 (Ind. 1984) (finding harmless error in allowing testimony regarding victim's children where error could not have substantially influenced the jury).

c. *Witnesses' purported truthfulness*

Ledo next asserts that his trial counsel was ineffective for failing to object to witnesses' testimony regarding their truthfulness. Ledo contends that the trial court would have sustained an objection pursuant to Evidence Rule 704(b) and that "[b]ecause credibility of the State's witnesses was the focal point at trial, it stretches the imagine

[sic] to the utmost to say that allowing the State's star witnesses to vouch for their own credibility was harmless error." Ledo's Br. 25.

Evidence Rule 704(b) provides that a witness may not testify as to whether a witness has testified truthfully. "Such testimony is an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony." *Rose v. State*, 846 N.E.2d 363, 367 (Ind. Ct. App. 2006).

In this case, the State asked Fitzhugh whether he "told the truth today," to which Fitzhugh replied that he had. (Tr. 723). The State asked Clevenger whether his "plea agreement call[ed] for [him] to testify truthfully and cooperate . . . ." Clevenger replied in the affirmative. (Tr. 1018). The State also asked Clevenger whether he was "telling the truth today," to which Clevenger replied, "[y]es sir." (Tr. 1018).

During the post-conviction hearing, trial counsel testified that he did not object to Fitzhugh's testimony because he "didn't think the jury would find him credible anyway." (App. 275). Trial counsel, however, testified that he should have objected to Clevenger's testimony.

The post-conviction court determined that

> The question asked of Fitzhugh and Clevinger [sic] by the prosecutor as to whether they were telling the truth was clearly objectionable and had the trial court objected, the Court would have had no choice but to sustain the objection. However, it is not likely that the Petitioner was prejudiced by the responses or counsel's failure to object.

(App. 234). We agree.

Prior to testifying, both Fitzhugh and Clevenger were sworn under oath that they would give truthful testimony in the instant case. In the course of giving their testimony,

Fitzhugh and Clevenger both repeated that they were being truthful. We do not find, however, that their brief statements that they testified truthfully bolstered their credibility or impinged upon the province of the jury to determine their credibility. Ledo has failed to demonstrate that there is a reasonable probability that, but for trial counsel's failure to object to the testimony, the result of the trial would have been different.

d. *Hearsay testimony*

Ledo further asserts that he received ineffective assistance of trial counsel because his trial counsel failed to object to two instances of purported hearsay testimony. Specifically, Ledo argues that trial counsel should have objected to the testimony of Warner and Jerry Vielhauer.

Warner testified as follows:

> [STATE]: Did Ledo say that he had said anything to [Fitzhugh]?
>
> [WARNER]: Did . . . what's that?
>
> [STATE]: Did Ledo say at this time when you guys were all smoking, did he say that he had said . . .
>
> [WARNER]: --Yeah, he said that . . .
>
> [STATE]: . . . anything to [Fitzhugh]?
>
> [WARNER]: . . . he said that Ledo said he told him to shoot him. From there then [Fitzhugh] started bragging, he goes well I blew his shit away. I blew his neck off and he goes, he said he should have cooperated.
>
> [STATE]: Who said that?
>
> [WARNER]: Bryan.

(Tr. 879-80).

The State maintains that Warner's testimony is not hearsay because "Warner was testifying that he himself had heard Petitioner's statement to the effect that Petitioner told Fitzhugh to shoot the victim," and such "statement in Warner's presence was an admission by a party-opponent and therefore not hearsay." State's Br. 15. We agree.

Evidence Rule 801(d)(2)(A) provides that a statement is not hearsay if "[t]he statement is offered against a party and . . . is the party's own statement . . . ." Here, Warner testified as to what Ledo said, namely that Ledo admitted to telling Fitzhugh to shoot Osterholt. Given that the admission of Warner's testimony is an exception to the hearsay rule, Ledo cannot show that the trial court would have sustained an objection to it.

Vielhauer testified that the day after the murder, he went to Allen's apartment and "asked him whose guns those were and Allen said they were Ledo's guns . . . ." (Tr. 1057). Vielhauer further testified that he took the guns from Allen's apartment, after which he was arrested. After becoming concerned that "one of those four weapons that [he] had was the murder weapon," Fitzhugh "said don't worry about it dog. They'll never find the murder weapon." (Tr. 1062).

Prior to Vielhauer's testimony, Allen testified that Ledo dropped off four guns at Allen's house the day after the murder. Allen also testified that Vielhauer told him that Ledo "had sent him over for . . . to get the guns." (Tr. 1052). Given this testimony, we cannot say that the admission of Vielhauer's testimony prejudiced Ledo to the extent that had the trial court sustained an objection to it, the outcome of the proceeding would have

been different. Furthermore, Ledo fails to show how the failure to object to Vielhauer's testimony regarding Fitzhugh's statement prejudiced him.

e. *Judge's potential conflict*

Ledo contends that "he was denied the effective assistance of counsel when Trial Counsel failed to adequately advise him of a conflict-of-interest with the presiding judge," and that "Trial Counsel should have advised Ledo that Judge Gull had an obligation to recuse herself since she had served as counsel for State in one of the prior felonies used to charge the habitual offender." Ledo's Br. 30, 32. We disagree with these contentions.

As to the first contention, the presiding judge, Judge Gull, advised the parties as follows:

> [I]n reviewing the Amended Information for the Habitual Offender . . . I observed . . . a conviction for Conspiracy To Commit Forgery as a Class C Felony. Mr. Ledo, apparently although I have no independent recollection of this, I in my former capacity of Chief Counsel with the Prosecuting Attorney's Office signed the Information's [sic] and the Affidavit of Probable Cause . . . although I was not the assigned Deputy Prosecutor . . . . Apparently you entered a plea of guilty on that case pursuant to a plea agreement and I supposedly would have covered Court on that date. . . . [M]y name appears as representing the State of Indiana at your sentencing Mr. Ledo. Until this was brought to my attention, I had no independent and still have no independent recollection of you . . . . The problem is is that I have signed the Affidavit. I signed the Information and my name in fact appears on the docket. The State has indicated that those certified copies will be submitted if we get to the proceeding on the Habitual Offender Mr. Ledo. That's only if the jury convicts you . . . . There is an apparent conflict of interest with this Court Mr. Ledo. Your attorney in chambers indicated that you had brought this to his attention approximately three weeks ago and expressed some concern over the fact that my name is in fact on the documents that will be going back to the jury and perhaps also expressed some concerns to your attorney on me being the trial Judge on your case.

(Tr. 477-79). The trial court then advised Ledo she could recuse herself "just based on the apparent conflict of interest . . . ." (Tr. 479).

Ledo's trial counsel, however, advised that they were "prepared to go forward on the trial . . . ." (Tr. 479-80). Ledo's trial counsel then confirmed with Ledo that he wished to go forward with the trial. The following colloquy between Ledo and his trial counsel then took place:

> MR. HICKS: Again, do you have any problem with Judge Gull being the Judge in your case as it proceeds this morning?
>
> MR. LEDO: No I don't you all.
>
> MR. HICKS: Do you also understand . . . that Judge Gull, if you are convicted, will be the sentencing Judge?
>
> MR. LEDO: Correct, I understand.

(Tr. 481). Ledo then consented to Judge Gull presiding over his case with the stipulation that Judge Gull's name and/or signature would be redacted from all documents relating to his previous conviction presented to the jury.

Upon review of the record, it is clear that Ledo's trial counsel advised Ledo of Judge Gull's apparent conflict of interest and that she redacted her signatures from all documents submitted to the jurors. Thus, we do not find ineffective assistance of counsel.

Furthermore, we find Ledo's assertion that his trial counsel "should have advised [him] that Judge Gull had an obligation to recuse herself" unpersuasive. *See Dishman v. State*, 525 N.E.2d 284, 285 (Ind. 1988) (finding defendant not entitled to change of judge,

where presiding judge had prosecuted defendant in two cases which formed basis for habitual offender charge). "[W]hile a trial judge has the discretion to disqualify himself or herself whenever any semblance of judicial bias or prejudice arises, disqualification is not required unless actual prejudice or bias exists." *Cook v. State*, 612 N.E.2d 1085, 1087 (Ind. Ct. App. 1993). "A judge is presumed unbiased and unprejudiced, and to rebut the presumption, the defendant must establish from the judge's conduct actual bias or prejudice which places the defendant in jeopardy." *Id.* at 1088. Here, Ledo has failed to demonstrate either prejudice or bias.

f. *DNA evidence*

Ledo asserts that he received ineffective assistance of counsel because trial counsel "failed to reasonably investigate DNA evidence in this case." Ledo's Br. 33. We disagree.

In support of his assertion, Ledo states:

> Ledo testified that DNA testing had been done on items of physical evidence found at the crime scene, that his DNA had not been found on those items, and that he had asked Trial Counsel to bring this up at trial. Despite the fact that Trial Counsel testified that he had no memory of DNA evidence in connection with Ledo's case, and that he expressed the opinion that from what he did know of Ledo's case it probably would not have been wise to pursue the issue of DNA evidence, the trial record indicates that on March 11, 1998, Trial Counsel filed a "Motion for Continuance" of the trial alleging in paragraph 1, "That the undersigned was recently informed that DNA test results that are essential to this defense have yet to be received by the Prosecutor." The trial record further indicates that on October 29, 1998, [the] State amended its witness list to add one Christopher Hopkins, an FBI DNA expert . . . .

Ledo's Br. 32 (citations to the record omitted). Ledo, however, presents no evidence that tests for DNA evidence were either performed or completed or that there was any DNA evidence in this case.

Furthermore, during the post-conviction hearing, Ledo's trial counsel testified that "[f]rom what [he] kn[e]w from doing the trial," pursuing DNA testing "probably wouldn't have helped." (App. 301). Thus, not investigating the possible presence of DNA evidence or not pursuing DNA evidence, which may have been prejudicial to Ledo, was a tactical decision, and we defer to such a decision.

2. Presiding Trial Judge

Ledo contends that he was "denied a fair habitual offender hearing when . . . State's Exhibit 91 was admitted containing an unredacted handwritten docket entry stating that Judge Gull had represented [the] State at the sentencing hearing" for one of the cases from which his habitual offender charge arose. Ledo's Br. 35. Ledo argues that "when the unredacted State's Exhibit 91 was admitted into evidence Judge Gull should have declared a mistrial, recused herself from presiding further over the habitual offender proceedings and, at a minimum, granted Ledo a new habitual offender hearing." Ledo's Br. 37. The State argues that Ledo has waived this issue. We agree with the State.

"Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available." *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. "If an issue was known and available, but not raised on direct appeal, it is waived." *Id.* Such waiver also applies to fundamental error claims. *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002). "In post-conviction proceedings, complaints that

something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." *Id.*

Ledo failed to raise this issue on direct appeal despite its being available. Accordingly, he has waived the issue.

3. Newly Discovered Evidence

Ledo asserts that newly-discovered evidence requires a new trial. Specifically, Ledo argues the post-conviction court should have granted his petition because Fitzhugh recanted his testimony in an affidavit.

In order for newly-discovered evidence to merit relief, the claimant must establish each of the following prongs: (1) that the evidence was not available at trial; (2) that it is material and relevant; (3) that it is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result. *Id*. "A sufficient probability of a different result upon retrial is present where the omitted evidence would create a reasonable doubt that did not otherwise exist." *Rhymer v. State*, 627 N.E.2d 822, 824 (Ind. Ct. App. 1994), *reh'g denied*. "The party requesting the new trial has the burden of demonstrating the existence of all nine factors." *Allen v. State*, 791 N.E.2d 748, 754 (Ind. Ct. App. 2003), *trans. denied*.

Following the first evidentiary hearing before the post-conviction court, Ledo filed a motion to reopen or amend his petition for post-conviction relief on May 6, 2004. Ledo

sought the amendment "to include the allegation of newly discovered evidence in the form of an affidavit by [Fitzhugh] . . . in which he recants his testimony against [Ledo]." (App. 173). In the affidavit, signed on January 13, 2004, Fitzhugh averred to the following:

> I, Bryan Lamar Fitzhugh, would like to recant my testimony in the 1998 Ulises Ledo Murder Trial. What I did was entirely wrong. I was coerced by my attorney and the Prosecutor's Office into falsely implicating Mr. Ledo in order to avert from my receiving the death penalty.
>
> Mr. Ledo was never made aware of what was to take place [o]ther than the fact that we were going to the Osterholt place to purchase some "weed". Mr. Ledo never entered the trailer nor told me to kill Mr. Osterholt. All this was committed by myself.
>
> The Prosecutor's Office advised my attorney . . . that if he did not "convince" me to implicate Mr. Ledo that "they will get a verdict for the death penality [sic] on me from the statements that Mr. Ledo made against me." Now I know that Mr. Ledo had never given any statements, verbally or written, to anyone accusing me of anything. The prosecutor tricked me into lying on this man when he in fact is innocent. I would like to bring all this into court and set this man free.

(App. 175).

The post-conviction court held a second evidentiary hearing on July 14, 2005. Fitzhugh, however, invoked his Fifth Amendment right to remain silent and refused to testify.

Here, we cannot say that Ledo has met the nine criteria for a new trial. Admitting Fitzhugh's affidavit would merely serve as an attempt to impeach him at a new trial. Furthermore, Ledo has not shown that the evidence is worthy of credit, that Fitzhugh's testimony could be produced in a new trial, or that it would produce a different result. Thus, we find that Ledo is not entitled to a new trial based on newly-discovered evidence.

4. Habitual Offender Determination

Ledo asserts that "the habitual offender determination should be reversed because he had one count of one of the underlying charges used to support the habitual offender [sic] vacated." Ledo's Br. 37. The State "may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions." I.C. § 35-50-2-8. Pursuant to Indiana Code section 35-50-2-8(c)

> A person has accumulated two (2) prior unrelated felony convictions for purposes of this section only if:
>
> (1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and
> (2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction.

A conviction, however, does not count as a prior unrelated felony conviction if it has been set aside. I.C. § 35-50-2-8(d).

The facts pertinent to this case follow. On July 31, 1990, by information, the State charged Ledo under cause number 02D04-9007-CF-460 ("Cause No. 460") with five counts of conspiracy to commit forgery. Specifically, the State alleged that Ledo had committed conspiracy to commit fraud on or about May 26, 1990; May 27, 1990; May 27, 1990; May 28, 1990; and June 19, 1990, under Counts I, II, III, IV, and V, respectively. The trial court sentenced Ledo on all five counts on August 16, 1991.

On February 16, 1995, the Court of Common Pleas in Allen County, Ohio issued an indictment, asserting that Ledo had committed theft on or about January 6, 1995.

Ledo was convicted of grand theft, a felony, on March 6, 1995, and the trial court sentenced him on April 24, 1995.

Based upon the above facts, the State in this case filed a second information on all counts, alleging Ledo to be an habitual offender for having committed conspiracy to commit forgery, a class C felony, on or about May 27, 1990, and having been convicted and sentenced for the same on August 16, 1991, under Cause No. 460; and for having committed grand theft, a class D felony, on or about January 6, 1994, and having been sentenced for the same on April 24, 1995. On November 16, 1998, the State filed an amended information, alleging that Ledo had committed grand theft, a class D felony, on January 6, 1995.

During the habitual offender phase of the trial, the trial court admitted into evidence copies of the information charging Ledo with five counts of conspiracy to commit forgery under Cause No. 460. The trial court also admitted into evidence a copy of the indictment from Allen County, Ohio against Ledo for theft and the judgment entry on sentencing, dated April 24, 1995, for his March 6, 1995 conviction for grand theft.

The trial court then instructed the jury as follows:

> The second part of the information in this case charges the defendant with being a habitual offender. The charging [i]nformation reads that the defendant has accumulated two prior unrelated felony convictions in that first: on or about May twenty-seventh, nineteen ninety, in Allen County, Indiana, said defendant Ulises Ledo did commit a criminal act to wit: Conspiracy to Commit Forgery, a Class C Felony and that the defendant was in [Cause No. 460] convicted and sentenced for the commission of said felony on the [sic] August sixteenth, nineteen ninety-one . . . . Secondly: after the defendant had been convicted and sentenced . . . in [Cause No. 460], the defendant did on or about the sixth day of January, nineteen ninety-five, commit another unrelated felony criminal act to wit: Grand

> Theft, a Class D Felony and that said defendant was . . . convicted and sentenced for the commission of that felony on the twenty-fourth of April, nineteen ninety-five . . . . In order for the prior offenses to support a finding that the defendant is a habitual offender, the prior offenses must have been felony convictions separate from and unrelated to each other and the charge currently being made against the defendant. . . . In order for the prior felony convictions to qualify as separate and unrelated, the following sequence of events must occur. One: the commission of the first offense followed by two: a sentence imposed for that offense followed by three: the commission of the second offense followed by four: sentence imposed for the second offense followed by five: the commission of the offense for which the defendant is now on trial.

(Tr. 1526-29) (emphasis added). Using a general verdict form, the jury returned a finding that Ledo was an habitual offender.

At some point after being convicted in the instant case, Ledo filed a petition for post-conviction relief as to the five-count conviction under Cause No. 460. On April 26, 2001, the post-conviction court entered an order dismissing Count III but denying relief as to Counts I, II, IV, and V.

In the amended petition for post-conviction relief at issue here, Ledo asserted that "[t]he determination that petitioner was an habitual offender should be reversed because petitioner had had one count of one of the underlying charges used to support the habitual vacated." (App. 149). The post-conviction court, however, denied Ledo relief on this issue, concluding that Ledo's case is similar to *Elmore v. State*, 688 N.E.2d 213 (Ind. Ct. App. 1997), *trans. denied*.

In *Elmore*, Elmore was convicted of theft, a class D felony, and the jury found him to be an habitual offender after the State offered proof of 14 prior convictions. Specifically, the State presented the following evidence:

> [T]hat at the time [Elmore] committed the instant offense, Elmore had been convicted of the following prior felonies: second-degree burglary under cause number CR-73-214 ("214"); two counts of theft under cause number 2CR-85-378-239 ("239"); two counts of theft under cause number 2CR-284-978-811 ("811"); and nine counts of theft under cause number 2CR-290-078-820 ("820"). Under cause number 214, Elmore was convicted and sentenced for one count of theft on October 3, 1975. Elmore committed the felonies listed under cause numbers 239, 811, and 820 between March 14, 1978 and August 29, 1978. He was sentenced for all the counts under those cause numbers on May 1, 1979.

688 N.E.2d at 219 (footnote omitted). Subsequently, one of the convictions for which Elmore was sentenced on May 1, 1979 was vacated. *Id.* at 216.

On appeal from the denial of his petition for post-conviction relief, Elmore claimed "that since one of the prior convictions ha[d] been set aside and the jury did not indicate which of the prior felonies it based the habitual offender status on, he [wa]s entitled to have the habitual offender status set aside." *Id.*

This court, however, determined that

> [a]lthough the jury was instructed that Elmore had been convicted and sentenced on a single day of two counts under cause number 239, two counts under cause number 811, and nine counts under cause number 820, the felonies were committed on different days. Therefore, at the time of the habitual phase, all 13 felonies satisfied the definition of prior unrelated felony convictions since they all occurred separate and apart from Elmore's second-degree burglary conviction which occurred on March 11, 1986. . . . [A]ny one of the 13 felonies could have combined with the theft conviction under cause number 214 to support the habitual offender determination. The other felony convictions were, in essence, alternative proofs offered by the prosecution.

Id. at 219 (citations omitted). Accordingly, this court found "that because 12 other felony convictions conformed to the statutory requirement, the fact that one of the convictions did not so conform is not grounds for reversal." *Id.*

We find this case akin to *Elmore*. Here, the State presented evidence that Ledo had been convicted and sentenced on a single day of multiple counts for conspiracy to commit fraud under Cause No. 460. Ledo committed the offenses for which he was convicted on or about May 27, 1990, namely from May 26, 1990 through June 19, 1990. The State also presented evidence of a subsequent felony, which was committed after sentencing under Cause No. 460 and before the commission of the current offenses. At the time of the habitual offender phase of the trial, any one of the five counts of conspiracy to commit fraud could have been combined with the Ohio theft conviction to support the jury's habitual offender finding.

As in *Elmore*, "[t]he other felony convictions were, in essence, alternative proofs offered by the prosecution." *Elmore*, 688 N.E.2d at 219. The fact that the post-conviction court later dismissed one of the counts under Cause No. 460 did not invalidate Ledo's conviction, where four counts remained.[1] Accordingly, we do not find that Ledo is entitled to a reversal of the habitual offender finding.

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[1] This case is distinguishable from *Nash v. State*, 545 N.E.2d 566 (Ind. 1989), where the trial court instructed the jury that Nash had accumulated two or more prior unrelated felony convictions, namely that 1) Nash had been convicted of and sentenced for the felonies of theft and auto banditry in cause number 4CR-135-675-584 on January 9, 1976; and 2) Nash had been convicted of and sentenced for the felony of interstate transportation of a stolen motor vehicle on July 27, 1979. 545 N.E.2d at 567-68. The trial court further instructed the jury as follows: "The term 'prior unrelated felony conviction' means a felony conviction for which the person is convicted and sentenced, separate and apart from any subsequent felony conviction and sentence." *Id.* at 568.

During the jury's deliberations, Nash informed the trial court that this court had vacated his conviction for auto banditry although it had affirmed the theft conviction. *Id.* The jury then returned a general verdict finding Nash to be an habitual offender. *Id.*

Nash appealed his habitual offender determination, asserting that "there was an allegation and proof of ineligible felony conviction." *Id.* at 567. The Indiana Supreme Court agreed, setting forth its reasoning as follows:

> It is proper habitual offender practice for the State to plead and prove more than two prior unrelated felony convictions. The additional convictions are deemed harmless

Affirmed.

BAKER, J., and ROBB, J., concur.

> surplusage. Where, however, such a group of more than two includes one or more felonies which do not meet statutory criteria and a general verdict of habitual offender is returned, a retrial of the habitual offender allegation is required. This is so because the general verdict of the trier of fact may rest upon an ineligible prior conviction alone. Here, the jury was instructed that [Nash] was convicted on a single day of two felonies, theft and automobile banditry. Both satisfied the definition of prior unrelated felony conviction in the instructions since both occurred "separate and apart from any subsequent felony conviction and sentence," namely the later federal one for interstate transportation, and both cannot meet the correct statutory criteria in a single case. The jury received no instruction that it could not consider the theft and automobile banditry convictions as separate and unrelated and could have rationally concluded that those two convictions alone could support a verdict of habitual criminal.
>
> The State contends that the jury was presented in total with only two prior unrelated felony convictions. This reading of the instructions is not tenable. The jury was instructed with the plural "felonies" when referring to the theft and automobile banditry, which is not indicative of a single conviction. Although the single cause number under which the two existed tends to indicate a single conviction, that indication is slight and does not undermine the clear import of the instruction that two felony convictions were had on that date. The jury was presented with an allegation and proof of three prior felony convictions.

Id. at 568-69.

Indiana's Supreme Court was concerned that the jury could have based its habitual offender determination on only the theft and auto banditry convictions, one of which was later vacated and therefore failed to meet the statutory requirement of a prior felony conviction. *See id.* at 568 ("The jury . . . could have rationally concluded that those two convictions alone could support a verdict of habitual criminal.").

In this case, there is no such concern as the State presented the jury with two convictions, for conspiracy to commit fraud and theft, upon which the jury could base a finding of habitual offender. As neither have been set aside, they continue to meet the statutory requirements of a prior felony conviction. Thus, the jury's general verdict has not rested "upon an ineligible prior conviction . . . ." *Id.*